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Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. _____

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1986

JOHN EMIL BOMHARDT
Appellant
v.
STATE OF MARYLAND
Appellee

On Appeal From the Court of Special Appeals of the State of Maryland

JURISDICTIONAL STATEMENT

ANDREW J. GROSZER, JR., ESQUIRE
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QUESTIONS PRESENTED

1

Are the criminal provisions of section 320 of Article 81 of the Annotated Code of Maryland invalid because the terms, definitions and requirements of Article 81, and the forms provided thereunder, are vague, ambiguous and discriminatory and, thus, unconstitutional and contrary to the due process and equal protection guarantees of the Fourteenth Amendment to the U.S. Constitution?

2

Did the State of Maryland act unconstitutionally and contrary to the due process and equal protection clauses of the Fourteenth Amendment to the U.S. Constitution when a married laboratory technician was imprisoned by the State for willful failure to file income tax forms where the forms provided by the State Comptroller are vague, ambiguous, and discriminatory, the text of the underlying statute is also vague, ambiguous and discriminatory and the commanded filing would impair the sustenance of the technician and his spouse by invading the technician's property rights in his labor?

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

No. _____

JOHN EMIL BOMHARDT
Appellant
v.

STATE OF MARYLAND
Appellee

On Appeal From the Court of Special
Appeals of the State of Maryland

JURISDICTIONAL STATEMENT

John Emil Bomhardt, the appellant, appeals from the final judgment of the Court of Special Appeals of the State of Maryland, dated October 8, 1986, holding that Section 320 of Article 81 of the Annotated Code of the State of Maryland, as applied in this case, is not unconstitutional as being violative of appellant's right to due process of law and equal protection of the law guaranteed by the Fourteenth Amendment of the Constitution of the United States and not violative of appellant's rights reserved in the Ninth Amendment to the U.S. Constitution regarding marriage, procreation and the preservation of the same. This Court has jurisdiction of this appeal. The federal question was raised below and is a substantial issue important to the rights of a large class of citizens.

OPINIONS BELOW

The opinion of the Court of Special Appeals of Maryland, dated September 8, 1986, which appears in the appendix hereto at page 6a is unreported.

There are no other opinions below.

JURISDICTION

The judgment of the Court of Special Appeals of Maryland, which is the final appeal of right in the courts of Maryland from the appellant's criminal conviction, was made final for the federal questions when the mandate was issued on October 8, 1986. See page 5a . It became the final judgment when the highest court in Maryland, the Court of Appeals of Maryland, denied a timely Petition for Writ of Certiorari on January 2, 1987 See page 4a .

A notice of appeal to this Court was timely filed in the Court of Special Appeals of Maryland on March 26, 1987.

This appeal is being docketed in this Court within 90 days from the denial of the Petition for Writ of Certiorari below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

United States Constitution

> Ninth Amendment: The enumeration of certain rights, shall not be construed to deny or disparage others retained by the people.
>
> Fourteenth Amendment (pertinent parts of § 1.): ..... nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

State Statute

> Maryland Annotated Code, § 320 Article 81: The failure on the part of any person or taxpayer to file a return or report as required by the provisions of this subtitle, or to comply with any action taken by the Comptroller pursuant to § 304 hereof shall be deemed a violation of the provisions of this subtitle subject to penalty and interest as prescribed in § 318 hereof. The willful failure on the part of any person or taxpayer to file a return or a report as required by the provisions of this subtitle or to comply with any action taken by the Comptroller pursuant to § 304 hereof shall be a misdemeanor, subject to a fine of not exceeding five hundred dollars ($500) or imprisonment for not exceeding six months, or both, in the discretion of the Court.

HOW THE FEDERAL QUESTION WAS RAISED

The issue of a court's lack of jurisdiction can be raised in the Maryland courts at any time under the rules, laws and constitution of Maryland. The courts do not have jurisdiction to enforce an unconstitutional statute as was attempted in the instant case.

As early as the time of his arrest and in all the proceedings of this case, the appellant claimed the court lacked jurisdiction. At the appellant's arraignment, the presiding judge directed the Assistant State's Attorney for Anne Arundel County, then present, to notify the prosecuting office, the Attorney General of Maryland, to set a hearing on any motions, which would include the jurisdictional issue. Such a hearing was never held.

After the trial, in which the appellant defended himself, a hearing was held on appellant's Motion for a New Trial. At this time the specific federal question was heard and ruled upon by the trial judge. The appellant's written memorandum was filed and read at this hearing. Appellant contended that "in addition, constitutional questions of denial of due process and equal protection of the laws are involved. . . § 320 of Article 81 as a penal statute is unconstitutionally vague. . . the form for the income tax return supplied by the Comptroller is discriminatory. . ." The appellant quoted the Maryland Law Encyclopedia to support the reference to the federal constitutional (the Fourteenth Amendment) guarantees of due process and equal protection.

The Fourteenth Amendment claim was reiterated by appellant, through counsel, before the Court of Special Appeals of Maryland and the appellant prayed that the Court would "(1) sever § 320 from Article 81 and declare it null and void, (2) enter a finding that the forms and regulations promulgated by the Comptroller of the Treasury do not provide for equal treatment for those in the master-servant relationship as required by law and the constitution and (3) reverse the judgment of the Circuit Court for Anne Arundel County and vacate the order of the Honorable Judge Eugene M. Lerner imposing sentence."

Appellant's appeal brief made the additional subsidiary claim that "the discrimination here is derogatory of fundamental rights with no necessity for a compelling state interest. It violates the guarantee of

liberty as found in the Fifth Amendment due process clause (freedom of contract) and the rights reserved in the Ninth Amendment (marriage, procreation and the preservation of the same)."

The Court of Special Appeals of Maryland held "that appellant's duty to file was stated with sufficient specificity." And, in regards to discrimination, the Court states, "Thus, appellant's contention is without merit."

The Court thus considered and expressly rejected these federal constitutional claims. When the highest court, the Court of Appeals of Maryland, denied the Petition for Writ of Certiorari, it allowed the rejection to stand.

STATEMENT OF THE CASE

The prosecution of this case commenced on April 10, 1985 when the Attorney General of Maryland filed a three count Criminal Information in the District Court of Maryland for Anne Arundel County, Annapolis, charging the appellant with the willful failure to file income tax returns for the years 1981, 1982 and 1983. The appellant was found guilty of the three counts by a jury after a trial on the 9th and 10th of October, 1985 in the Circuit Court for Anne Arundel County, the Honorable Eugene M. Lerner presiding. The appellant was sentenced to six months incarceration on each of the three counts on which he was convicted, to be served consecutively, and was fined the maximum of $500 on each count. Upon sentencing on November 22, 1985, the appellant was immediately sent to the Anne Arundel County Detention Center. He was released on bail after a hearing on a Writ of Habeas Corpus on December 12, 1985. After the appeal to the Court of Special Appeals and a remand hearing, bail was revoked and the appellant was again incarcerated in the Detention Center on January 16, 1987 where he continues to be incarcerated as a result of the mandate and opinion of the Court of Special Appeals of Maryland. The remand hearing was on a State issue and is now on appeal to the Court of Special Appeals of Maryland.

The relevant facts that led to the charge, while contested in various respects, may be fairly summarized as follows:

The appellant has been employed by the Westinghouse Corporation for the past 29 years and at the time of his arrest he was a laboratory technician there.

During 1981, Westinghouse paid him wages in the amount of $25,178.19 for his labor. During 1982, he received wages from Westinghouse in the amount of $28,093.91, and for the year 1983, he received wages from Westinghouse in the amount of $29,543.91. During this period, the appellant also maintained a rental property from which he received rent in the amount of $2,435.27 for the year 1981, $2,775 for the year 1982, and $3,245 for the year 1983.

On November 29, 1984, the Comptroller's office notified the appellant that they were unable to locate his returns for 1979 to 1983 and that it appeared that returns should have been filed. The appellant and his wife had filed a Maryland income tax form for the year 1978 on April 12, 1979 and had received a refund of $62.99.

There was testimony by state officials at the trial below to the effect that filing of state income tax returns is required if gross income is $3000 for singles and $5400 for married, filing jointly, being the total of all incomes.

THE QUESTION IS SUBSTANTIAL

The question as to the Fourteenth Amendment implications of the widespread practice of the States to reference their income tax statutes to a portion of the federal Internal Revenue Code is a novel and substantial one. It has never been treated before by this Court.

Maryland is one of these states and the appellant contends that the partial adoption of the federal statute into the Maryland statute causes vague and ambiguous provisions which do not have sufficient specificity to identify, segregate and tally the accession of wealth obtained in the business transactions of exchanging wages for labor.

The State of Maryland in Article 81 of the Annotated Code of Maryland, the subject statute of the instant case, adopts the adjusted gross income provisions of Title 26 of the United States Code, but it does not incorporate the personal exemption portions of Title 26. It provides a Maryland personal exemption which differs from the dollar amount designated in Title 26. The federal exemption is intended to cover family expenses. See The General Explanation of the Tax Reform Act of 1969 by the staff of the Joint Committee on Internal Revenue Taxation (U.S. Congress) at page 215 (1970).

It is not clear what the purpose of the Maryland exemption is. Although the intent of the Maryland Legislature may be the same as the United States Congress, the result cannot be the same because of the different magnitudes of the exemptions provided.

This difference is important because neither federal nor state statutes provide a schedule for computing the profit in wages for labor as is done for other sources generating profits which become accessions to the underlying wealth. In the instant case the underlying wealth is the consideration given by the appellant which includes his property in labor and the expense to maintain and deliver such labor.

These are strange sounds to our ears because we are not accustomed to any analysis of the theory behind the laying of taxes on labor. When a penal provision is added to a tax statute, it is imperative that the legislature's intent is clear and decisive so that the potential offender can take notice. The appellant's brief to the Court of Special Appeals discusses the vagueness, ambiguity and discrimination through analysis and review of the history of the income tax and relevant case law.

Included are a quote on vagueness *State v. Cherry,* 224 Md 144 (1961); conflicting cases on the income tax *Fax v. State Tax Comm.* 212 Md 296 (1957) and *Gardella v. Comptroller,* 213 Md 1 (1957); taxes on property compared to taxes on transactions *Knowleton v. Moore* 178 US 41 (1900); consideration in the labor contract *Adkins v. Children's Hospital,* 261 US 525 (1923), *West Coast Hotel v. Parrish,* 300 US 379 (1937), *Lucas v. Earl,* 281 US 111 (1930); defining income as profit *Eisner v. Macomber,* 252 US 189 (1920), *So. Pacific v. Lowe,* 247 US 334 (1917), *James v. U.S.,* 366 US 213 (1961).

The foregoing citations are for the purpose of illustrating concepts; they are not cited as precedent or authority as the facts are not remotely similar to the instant case. There are a number of cases in the lower federal courts where Title 26 has been considered with a resulting holding that "wages are income." These can be persuasive, but they fall short here because constitutional rights were not at issue and the whole text of Title 26 could be used in the findings whereas in the instant case only portions of Title 26 apply. Also, the cases do not treat consideration given by the laborer for the contract of labor.

The appellee has not addressed any analysis or review of any law relevant to the laying of taxes on labor. Although the opinion of the

Court of Special Appeals addresses the federal question, there is no analysis or reference to case law, treatises or other authority relevant to the laying of taxes on labor which could clarify the issues.

As the opinion of the Court of Special Appeals is unreported it is controlling for the appellant alone and cannot be used as precedent by any other party. This further discriminates against the appellant as the Court's holding directs the appellant to attach papers to the forms, but the Court gives no directive to the Comptroller to correct the forms.

The Court adopts the equivalence of gross income and total income. This is logical from the consideration of the federal 1040 form and the Maryland 502 form which both have total income as the sum of the income generated by the different sources (that is, receipts less expenses, etc.) and then calls the line after adjustments to total income "adjusted gross income." However, this is not considered a clarifying rule for the Comptroller to follow for the general public.

Thus, the courts of Maryland have failed to correct the derogation of rights of the appellant and of the large class of citizens that exchange labor for wages.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully Submitted,

ANDREW J. GROSZER, JR.
12209 Happy Hollow Road
Cockeysville, Maryland 21030
(301) 561-8047
Counsel for Appellant

APPENDIX

APPENDIX

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No. 1453

JOHN EMIL BOMHARDT
Appellant

v.

STATE OF MARYLAND
Appellee

In the Court of Special Appeals of Maryland

September Term, 1985

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that John Emil Bomhardt, the appellant above-named, hereby appeals to the Supreme Court of the United States from the mandate of this Court, entered on October 8, 1986, affirming the judgment of conviction as to the federal questions. A petition to the Court of Appeals of Maryland for Writ of Certiorari was denied on January 2, 1987.

This appeal is taken pursuant to § 1257(2) of Title 28 of the United States Code.

ANDREW J. GROSZER, JR.
12209 Happy Hollow Road
Cockeysville, Maryland 21030
(301) 561-8047
Counsel for Appellant

Filed March 26, 1987.

No. 1453

JOHN EMIL BOMHARDT
Appellant

v.

STATE OF MARYLAND
Appellee

In the Court of Special Appeals of Maryland

September Term, 1985

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Notice of Appeal to the United States Supreme Court was mailed to J. Joseph Curran, Attorney General, Seven North Calvert Street, Baltimore, Maryland 21202 and to Daniel Anderson, Assistant Attorney General, at the same address on the 26th day of March, 1987.

Andrew J. Groszer, Jr.
Attorney for Appellant

Filed March 26, 1987.

JOHN EMIL BOMHARDT

v.

STATE OF MARYLAND

In the Court of Appeals of Maryland

Petition Docket No. 418

September Term, 1986

(No. 1453 September Term, 1985
Court of Special Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answer filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

Robert C. Murphy
Chief Judge

Date: January 2, 1987

MANDATE

Court of Special Appeals of Maryland

No. 1453, September Term, 1985

John Emil Bomhardt

September 8, 1986: Per Curiam filed. Case remanded without affirmance or reversal to the Circuit Court for Anne Arundel County for the purpose of conducting a hearing on the authority of the Attorney General to prosecute these charges. The judgments on conviction remain in effect pending further proceedings. Costs to be paid five-sixths by appellant and one-sixth by Anne Arundel County.

v.

State of Maryland

October 8, 1986: Mandate issued.

STATEMENT OF COSTS:

In Circuit Court: for Anne Arundel County
IND No. 9216

Record $40.00
Stenographer's Costs $600.00

In Court of Special Appeals:

Filing Record on Appeal $50.00
Printing Brief for Appellant $211.20
Reply Brief .....$
Portion of Record Extract — Appellant .....$
Printing Brief for Cross-Appellee .....$

Printing Brief of Appellee $163.20
Portion of Record Extract — Appellee .....$
Printing Brief for Cross-Appellant .....$

STATE OF MARYLAND, Sct.:

I do hereby certify that the foregoing is truly taken from the records and proceedings of the said Court of Special Appeals.

In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court of Special Appeals, this Eighth day of October A.D. 1986.

Howard E. Friedman
Clerk of the Court of Special Appeals of Maryland

Costs shown on this Mandate are to be settled between counsel and NOT THROUGH THIS OFFICE.

UNREPORTED

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

No. 1453

September Term, 1985

JOHN EMIL BOMHARDT

v.

STATE OF MARYLAND

Bishop
Bloom
Bell, Rosalyn B.,

JJ.

PER CURIAM

Filed: September 8, 1986

John E. Bomhardt was convicted by a jury in the Circuit Court for Anne Arundel County of three counts of State income tax evasion. The court sentenced him to six month consecutive terms of imprisonment on each count and imposed a fine of $1500. Mr. Bomhardt appeals to this Court raising six questions for our resolution:

"I. Does a trial judge lack jurisdiction to sentence a defendant to imprisonment for willful failure to file income tax returns when the Information supplying the charge of willfullness (sic), initiated by the Attorney General with undisclosed authority, is not entered until after the defense rests?

"II. Has a defendant in an income tax case been denied an impartial jury where an Internal Revenue agent remains on a jury throughout *voir dire*?

"III. Is the duty of a married technician to file Maryland income tax forms, because he received wages for labor, stated in Article 81 of the Annotated code of Maryland with sufficient clarity and certainty to impose criminal sanctions?

"IV. Has the Comptroller for the State of Maryland arbitrarily and capriciously prescribed income tax forms for filing returns that discriminate against the equal opportunity of Maryland residents receiving wages for labor to freely and voluntarily assert the consideration given in the contract for labor?

"V. Does a jury have sufficient evidence to find the element of willfullness (sic) to support a guilty verdict where the State's exhibits show a defendant considered his conduct to be in conformity with the law?

"VI. Is a trial court's instructions on willfullness (sic) which holds the defendant to a standard of reasonableness erroneous?"

We find merit to only one of appellant's challenges and affirm subject to a limited remand.

JURISDICTION
— Information —

a. Jurisdiction

The record reflects that the Application for Statement of Charges, filed on April 10, 1985, contains the phrase "wilful failure to file taxes." When service of process was first attempted on May 1, 1985, appellant refused to accept the summons and Information; therefore, a warrant was obtained for his arrest. A second statement of charges was filed on May 2, 1985, which omitted the term "wilful," and merely charged him with "failure to file" taxes. Appellant was arrested based on this second statement of charges. Admittedly, a proper Information was filed before the case was completed. After the defense rested, the State filed a statement of charges with the court which did contain the word "wilful."

Appellant asserts the court lacked jurisdiction to sentence him because the Information supplying the charge of "wilful failure to file" income tax returns was not filed until after the defense rested. We hold that the trial judge did have jurisdiction and appellant waived his right to raise this defect.

"(The) primary purpose of a charging document is to fulfill the constitutional requirement contained in Article 21 of the Maryland Declaration of Rights that each person charged with a crime must be informed of the accusation against him." *Williams v. State*, 302 Md. 787, 790-91 (1985). The court in *Williams, supra,* established a two-pronged test. First, the charge must characterize the crime. Second, it must describe the alleged criminal act in enough detail to inform the accused of the specific conduct with which he is charged. *Id.* at 791.

> "(I)n determining, for jurisdictional purposes, whether an indictment sufficiently charges and characterizes a crime, (it is clear) that merely because the charging document does not allege, expressly or by implication, every essential element of an offense does not necessarily mean that no cognizable crime within the court's subject-matter jurisdiction has been charged (W)hile the customary method of identifying a particular crime charged in an indictment has been to aver its essential elements, that method is not exclusive. . . ."

State v. Chaney, 304 Md. 21, *cert. denied*, 106 S.Ct. 824 (1985). It is not necessarily fatal if the words of the indictment leave unspecified one or more essential elements of the crime. *Jones v State*, 303 Md. 323, 337 (1985), quoting *State v. Coblentz*, 167 Md. 523, 529 (1934). Furthermore, the particular conduct necessary to establish an offense need not be alleged as elements in the charging document. *Jones*, *supra* at 337.

In the case *sub judice*, appellant received a copy of the statement of charges which referred to the charge as "failure to file" an income tax return. This phrase adequately fulfills both prongs of the *Williams*, *supra*, test in that it characterizes and describes the crime. Appellant knew he was being charged with a criminal violation of Md. Code Ann. Art. 81, § 320 (1957, 1980 Repl. Vol., 1985 Cum. Supp.). He refers to this section of the Code in his pleading entitled "Specific Objection to States [sic] Response to Notice of Special continuing Appearance." Article 81, § 320, *supra*, includes only one criminal offense, the willful failure to file tax returns. Therefore, it is reasonable to conclude that appellant was aware he was being charged with this particular crime. Furthermore, he refers to the charge, including the term "willfully," in his "Demand to Strike Surplusages [sic] from Application for Charging Document," which states:

> "The [a]ccused appears specially and not generally in the above captioned action pursuant to Federal Rules of Criminal Procedure and appropriate Maryland Rules demanding that certain prejudicial allegations be *striken* [sic] *from the charging document* and probable cause application *to wit*: 2. ' . . . did *willfully* fail to file. . . .' " (Emphasis added.)

We hold that the purpose of the charging document was served. Appellant demonstrated he was aware of the accusations against him.

b. Waiver of Defect

"[W]here no cognizable crime is charged, the court lacks fundamental subject matter jurisdiction to render a judgment of conviction. . . ." *Williams*, *supra* at 792. In the case *sub judice*, the crime of willful failure to file tax returns was cognizable because the charging document adequately characterized the crime and informed appellant of the conduct with which he was charged. *Id.* at 791. Thus, the court had jurisdiction over this matter.

A defect in the charging document other than its failure to show jurisdiction in the court or its failure to charge an offense shall be raised by motion in conformity with this Rule and if not so raised is waived. Rule 4-252(a)(2). "A motion under section (a) of this Rule shall be filed within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court. . . ." Rule 4-252(b). Appellant's initial appearance before the court occurred on May 6, 1985. In accordance with the Rule, appellant had until June 5, 1985 to raise any nonjurisdictional defects. He waived his right to challenge the defect in the statement of charges by waiting until the morning of the trial to raise the objection. *Chaney, supra.* Accordingly, since the statement of charges in the case *sub judice* was not jurisdictionally defective and was not challenged in a timely fashion, appellant's contention is without merit.

— Prosecutorial Authorization —

Appellant also alleges that, even if the court was correct in applying both charging documents, the prosecutor was not authorized to litigate the case. Appellant contends that "[p]rosecution may be by the Attorney General when authorized by implementation of certain constitutional provisions. . . . The record does not state that authorization was given for this action (investigation or prosecution)."

The State asserts that appellant has waived this issue for our review. Conceding that before trial appellant sought removal of the Attorney General and appointment of a "public prosecutor," the State suggests that appellant's objection was based on his assertion that the Attorney General manifested a conflict of interest when it swore out the probable cause application in support of the statement of charges. The State argues that at no time did appellant specifically complain that the Attorney General lacked the necessary authorization needed to prosecute this matter.

The authority of the sovereign to govern and exercise control is jurisdictional. 50 C.J.S. *Jurisdiction* § 320 (Supp. 1985). A question of jurisdiction may be raised at any time. *Cooper v. State*, 44 Md. App. 59, 63 (1979). Appellant's objection is a jurisdictional one and hence may now be raised.

Article V, § 3(a) of the Constitution of Maryland sets out the duties of the Attorney General, including, *inter alia*:

> "(2) Investigate, commence, and prosecute or defend any civil or criminal suit or action or category of such suits or actions in any of the Federal Courts or in any Court of this State, or before administrative agencies and quasi legislative bodies, on the part of the State or in which the State may be interested, which the General Assembly by law or joint resolution, or the Governor, shall have directed or shall direct to be investigated, commenced and prosecuted or defended.
>
> "(3) When required by the General Assembly by law or joint resolution, or by the Governor, aid any State's Attorney or other authorized prosecuting officer in investigating, commencing, and prosecuting any criminal suit or action or category of such suits or actions brought by the State in any Court of this State."

In *State v Hunter*, 10 Md. App. 300, 305-06 n.5, (1970), this Court noted that under Art. V, § 9 of the Constitution of Maryland the power to prosecute at trial level formerly vested in the common law office of Attorney General passed to the State's Attorney. In *State v. Aquilla*, 18 Md. App. 487, 493-94, *cert. denied*, 269 Md. 755 (1973), we reaffirmed that responsibility for prosecuting criminal cases at the trial level devolved upon the State's Attorney. Specific authority under Art. V, § 3(a)(3), *supra*, is necessary for someone other than the State's Attorney to prosecute a criminal case.

In the case *sub judice*, the record is barren of any evidence that the Governor or General Assembly conferred on the Attorney General the authorization to investigate and prosecute State income tax violations, although the State asserts in its brief that such authority exists in a letter dated March 9, 1984 signed by Governor Hughes. Since we are restricted to the record, we order a limited remand under Rule 1071 to the trial court for the sole purpose of ascertaining whether the Attorney General possessed authority to maintain this prosecution. If on remand the court determines that the Attorney General possessed the requisite authority, the judgments of conviction entered are affirmed pursuant to our hold-

ings on the remaining issues. If, however, on remand the court determines that the Attorney General lacked the authority to prosecute, the judgments of conviction are vacated and set aside.

PANEL JUROR

Appellant claims the court erred in failing to exclude or isolate an Internal Revenue Service agent on the *voir dire* jury panel because "[t]his [juror] remained a member of the jury panel for an extensive period of time . . . sat with persons who ultimately constituted the jury of twelve throughout the *voir dire* . . . had ample opportunity to affect the impartiality of the jury, and did in fact make comments regarding 'tax protests.' "

The record reflects that juror number 24 was an I.R.S. agent. During *voir dire* questioning, this juror was struck for cause by appellant. The record reflects that he answered affirmatively the question whether he knew the attorneys in the case and whether he had previously served on a jury panel.[1]

[1]That is the full extent of the record relating to this juror.

The record is barren, however, of even a hint of any prejudicial comments made by this juror. It is equally barren of any objections made by appellant to such alleged comments. Failure of appellant to object contemporaneously to any improper remarks made by a prospective juror or to object prior to his expression that he was satisfied with the jury as empaneled, waives appellant's right to review of this issue. Rule 1085; *see White v. State,* 300 Md 719, 729 (1984), *cert. denied,* 470 U.S. , 105 S.Ct. 1779, *rehearing denied,* 476 U.S. , 105 S.Ct. 2351 (1985).

In any event, there is no merit to appellant's allegation. Unlike *Commonwealth v. Harkins*, 328 A.2d 156 (Pa. 1974, cited by appellant, the "prejudicial" remarks of juror 24 in the case *sub judice*, were not set out on the record, nor stated obviously in the presence of all prospective jurors. In *Harkins*, *supra*, a prospective juror announced aloud that he should not hear the trial because "he. [indicating the defendant] stole my car." *Id.* at 157.

Moreover, appellant does not suggest in what manner he was prejudiced by the remarks or the extent of prejudice. Instead, he merely asserts the remarks were prejudicial. We hold the court did not err in failing to exclude or isolate from the jury panel a tax agent.

MARYLAND TAX LAW

Appellant contends that the Maryland income tax laws violate due process. To this end, he asserts his duty to file a return under Md. Code Ann. Art. 81, § 320 (1957, 1980 Repl. Vol., 1985 Cum. Supp.) was not stated with sufficient clarity and certainty because the law does not state that wages are equal to income. We disagree.

Section 294 of Art. 81, *supra*, creates a duty on the part of each Maryland resident to file a tax return form with the comptroller. Md. Code Ann. Art. 81, § 294, *supra*. The Code also imposes both civil and criminal sanctions for failure to comply with § 294, *supra*, Md. Code Ann. Art. 81, § 320, *supra*. The comptroller is directed under Md. Code Ann. Art. 81, § 304(a), *supra*, to "apply as far as practicable the administration and judicial interpretation of the federal income tax law." *Comptroller of the Treasury v. Chesapeake Corp.*, 54 Md. App. 208, 214, *cert. denied*, 296 Md. 653 (1983). Section 6012 of 26 U.S.C. (1982) requires a married person to file when his or her gross income exceeds $5400. Gross income is defined in 26 U.S.C. § 61 (1982) as "the total of incomes." Although a number of items or sources of income are listed, none of these include wages in exchange for labor. It is clear, however, that wages for labor is implied in the phrase "income from whatever source derived," as provided in 26 U.S.C. § 61, *supra*. We hold that appellant's duty to file was stated with sufficient specificity.

MARYLAND TAX FORMS

Appellant argues that the "comptroller . . . has arbitrarily and capriciously prescribed income tax forms . . . [which] discriminate against the equal opportunity of Maryland residents receiving wages for labor to freely and voluntarily assert the consideration given in the contract for labor." He further contends that "the structure of the federal . . . and Maryland . . . forms for individual income tax returns discourages, and inhibits, the voluntary entry of the information necessary to sever income from wages for labor."

The Maryland income tax law clearly states a duty to file a tax return form. Md. Code Ann. Art. 81, § 294, *supra.* These forms do provide a "space" or "line" for income. They may, however, be added to in any manner. Appellant could easily have attached his request for an exemption to the form when he returned it, rather than ignore his duty to file. Further, if appellant claims he is exempt from filing because his wages equaled his labor, he must prove that such an exemption exists. *State Tax Commissioner v. Baltimore Block and Tile Co.*, 180 Md. 620, 627 (1942). Appellant failed to demonstrate that this exemption was authorized by law. Thus, appellant's contention is without merit.

SUFFICIENCY OF THE EVIDENCE

The State presented evidence to demonstrate that appellant's failure to file tax returns for 1981-1983 was willful. Appellant contends the evidence shows a lack of willfulness on his part, and claims a defense of subjective mistake of law. Where two opposing inferences may be drawn from the same evidence, the jury is at liberty to believe whichever inference it chooses. *Pinkney v. State,* 12 Md. App. 598, 604, *cert. denied,* 263 Md. 781 (1971).

The following evidence was presented by the State. Appellant did file an income tax return in 1978 but not thereafter. In 1982, however, he submitted a withholding form to his employer stating that he "did not owe any Maryland income tax." Appellant sent a letter to his employer requesting the return of a signed affidavit "in order to eliminate the possibility of an accusation of having filed a fraudulent withholding form." After receiving a letter from the office of the comptroller which informed appellant that he was not exempt from withholding tax, and which reported that his employer had been instructed to begin withholding taxes from his wages, appellant threatened to institute legal action against his employer. Appellant refused to file the tax forms for years 1979 and 1983 that were sent to him by a revenue specialist with the office of the comptroller. Interestingly, appellant demanded cash from the tenants of his rental property and preserved no record or receipt of this income.

"[W]illfulness may be established through proof that the accused's failure to file constituted a voluntary intentional violation of a known

legal duty, not the result of accident or mistake or other innocent cause." *Johnson v. State*, 294 Md. 515, 518-19 (1982). The reasonable inference could be drawn from the filing of a 1978 tax return form that appellant knew of the duty to file income tax returns yearly. His actions and correspondence with his employer demonstrate he understood the requirement of filing. Further, it was not unreasonable to infer that appellant demanded cash from his tenants to avoid declaring the rental income on his tax return. It was reasonable to conclude, therefore, that he did not have a "mistaken understanding of the law," as he claims.

Appellant points to State's Exhibits 4B and 5 to suggest the State established and proved a subjective mistake of law on his part. State's Exhibit 4B was an affidavit prepared and signed by appellant in which he stated that he was neither liable for any income tax nor required to submit an employee withholding exemption certificate. Exhibit 5 was a letter sent by appellant to his employer, which stated that the I.R.S. tax regulations did not apply in his case. Also submitted as part of Exhibit 5 was an MW-4 certificate with the word "incorrect" written in capital letters across its face.

Appellant confuses the possible existence of a defense with evidence sufficient to disprove willfulness. As stated, the jury was free to draw reasonable inferences from the evidence presented, *Pinkney*, *supra*, and the evidence was sufficient to prove the element of willfulness beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 319 (1979) (emphasis in original); *Tichnell v. State*, 287 Md. 695, 717 (1980).

JURY INSTRUCTIONS

Appellant argues that the trial court's instructions on willfulness were erroneous because they failed to inform the jury of the subjective mistake of law defense, and insufficient because they incorrectly explained willfulness. Appellant has failed to preserve these issues for our review. Rule 4-325(e). He did not object to the jury instruction on willfulness, either in discussion at the bench before the instruction was given, or immediately after it was read to the jury. On both occasions, appellant had the opportunity to object and did not do so. He did, however, object to other instructions at both times.

In any event, we find no error in the instructions. The Court of Appeals has held that "attention should not be focused on a particular portion [of the challenged instructions] lifted out of context, but rather its adequacy is determined by viewing it as a whole." *Poole v. State*, 295 Md. 167, 186 (1983), quoting *State v. Foster*, 263 Md. 388, 397 (1971), *cert. denied*, 406 U.S. 908 (1972).

In the case *sub judice*, the instruction given by the court was as follows:

> "As I instructed you an element of the crime with which the [d]efendant is charged is wilfulness. As used in the criminal law *wilfully characterizes an act which is done knowingly and with deliberate intention for which there is no reasonable excuse.* The element of deliberate intention requires that there be a full and conscious design to violate the law. *You are instructed that the [d]efendant's conduct is not wilful if he acted through negligence, inadvertence, justifiable excuse or mistake, or due to his good faith misunderstanding of the requirement of the law.* However, mere disagreement with the law in and of itself, does not constitute good faith misunderstanding of the requirements of the law, because it is the duty of all persons to obey the law whether or not they agree with it. Stated otherwise, while a good faith misunderstanding of the law may negate wilfulness, a good faith disagreement with the law does not. Furthermore, any misunderstanding must be in good faith." (Emphasis added.)

Appellant contends that the use of the phrase "no reasonable excuse" to explain willfulness negated the defense of subjective mistake of law. While the trial judge did use this language in the instruction, the language was explained. The court provided examples of situations where the defendant's conduct would not be deemed willful, and followed this with contrasting examples where willfulness would be present. He defined "good faith misunderstanding," and distinguished it from mere disagreement with the law. Finally the judge emphasized that any misunderstanding must be in good faith.

Thus, in light of the trial judge's clarifications and explanations, when the instruction is read *in toto*, it is correct. Therefore, appellant's contentions that the instruction was erroneous and insufficient to prove willfulness are without merit.

CASE REMANDED WITHOUT AFFIRMANCE OR REVERSAL TO THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY FOR THE PURPOSE OF CONDUCTING A HEARING ON THE AUTHORITY OF THE ATTORNEY GENERAL TO PROSECUTE THESE CHARGES.
THE JUDGMENTS ON CONVICTION REMAIN IN EFFECT PENDING FURTHER PROCEEDINGS.
COSTS TO BE PAID FIVE-SIXTHS BY APPELLANT AND ONE-SIXTH BY ANNE ARUNDEL COUNTY.

CIRCUIT COURT FOR ANNE ARUNDEL COUNTY

COMMITMENT RECORD

State of Maryland vs. John Emil Bomhardt
Criminal Case Number: 09216 DOB: 01/27/29
Docket: Folio:
Term: September 1985

Trial By Court Judge: Hon. Eugene M. Lerner

Date of Verdict: 10/10/85 Date Sentence Imposed: 11/22/85

Count Charge:

1. Failure to file income tax return
   Plea: Not Guilty — Verdict: Guilty

2. Failure to file income tax return
   Plea: Not Guilty — Verdict: Guilty

3. Failure to file income tax return
   Plea: Not Guilty — Verdict: Guilty

Prisoner is committed to the jurisdiction of the Superintendent of the Anne Arundel county Detention Center commencing on 11/22/85 for a period of:

Count	Years	Months	Days	
1		6		Concurrent
2		6		Consecutive
3		6		Consecutive

WT #2 CONS TO WT #1 & WT #3 CONS TO WTS. #1&2

Truly taken from the docket proceedings of the Circuit Court for Anne Arundel County, in testimony whereof, I hereunto set my name and affix the Seal of the said Court this 22nd day of November, 1985.

E. Aubrey Collison, Clerk
Circuit Court for Anne Arundel County